No. 15429

United States
COURT OF APPEALS
for the Ninth Circuit

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

APPELLANT'S REPLY BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon.

HON. CLAUDE McCOLLOCH, Judge.

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POINT I

REPLY TO APPELLEE'S ANSWER TO FIRST ASSIGNMENT OF ERROR

The principle points relied upon by appellant in Assignment of Error No. I are:

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POINT I

REPLY TO APPELLEE'S ANSWER TO FIRST ASSIGNMENT OF ERROR

The principle points relied upon by appellant in Assignment of Error No. I are:

(1) That a directed verdict is not appropriate when the appellant-buyer against whom it was directed had submitted substantial evidence of a change or rescission of contract, to-wit, a reduction in price, and

(2) That whether the contract between the parties was reduced in price was a question of fact for the jury despite the Statute of Frauds.

The appellee, in his brief, overlooks these points and falls back solely upon the Statute of Frauds. Two of the Oregon cases cited by the appellee, Callaghan v. Scandlin, 178 Or. 449, and Craswell v. Biggs, 160 Or 547, have no application either on their facts or their law to this case. In fact, one of the cases, Craswell v. Biggs, states at p. 560:

> "We are advertent to the rule that under certain conditions certain written instruments may be discharged or even modified by a subsequent parol contract, but the evidence sustaining such subsequent parol contract must be clear, convincing and conclusive and it must be predicated upon a legal and valid consideration."

The appellee, on page 8 and 9 of his brief, states that the appellant is seeking "to excuse himself from liability, sets up an oral agreement or statement by which the performance for which plaintiff sues was prevented."

The appellant's evidence, however, shows that there was either a written modification or rescission, consisting of the letter of October 23 (Ex. 3), as explained by the conversations surrounding it, or an oral modification or rescission, consisting of the parties' conversations.

The appellee's arguments as to oral modification or rescission has no application to the point of whether or not the letter of October 23 (Ex. 3), together with its surrounding conversations resulted in a modification or rescission of the original contract. Certainly written contracts are modified or rescinded every day in the business world by a letter.

The appellee states that he denies the truth of the appellant's testimony. He did that before the trial ever started, but that does not make the appellant's testimony untrue nor preclude it from being considered by the jury.

The appellee now contends also that he could not reduce his price on the corn because of his commitments to the farmers (Appellee's Brief, p. 12). How then could he agree to sell corn to the appellant at $8.00, a price less than the original contract price, as he did in his letter of October 23rd (Ex. 3)? Or is the appellee now trying to say that he never could actually reduce the price, and if he did, he only did it to help the appellant, but he wants to take back now what he said in that letter of October 23, because he should not have said it in the first place? That is certainly no answer to the fact that the appellee did actually give the appellant a reduced price. Rather, it is an apparent attempt by the appellee to again bolster his claim that he made at the trial for the first time that the price of $8.00 did not apply to the contract corn but only to corn over and above the contract. It is again submitted that that position is untenable. These parties had a contract for a considerable

amount of corn and when they talked price, they talked contract price. Had the appellant ordered corn at $8.00 in November or December, it would have been shipped at that price and applied to the contract. See appellee's cross-examination:

R. 56—

"Q. Isn't it a fact that you were actually prepared to hold up that contract almost indefinitely?

A. If the occasion had arose, I imagine we would have held it longer than that *had Mr. Willman purchased his monthly requirement at the market price.*

Q. You mean at the market price or at the $8.00 price?

A. At the $8.00 price."

Does not that statement alone give rise to a question of fact for the jury to decide as to whether or not the price had been reduced:

The appellant's position with respect to the Statute of Frauds is as follows:

1. That there was either

   (A) A modification, partly in writing and partly oral, of the original contract by the plaintiff's letter of October 23rd (Ex. 3), together with the conversations of the parties regarding price reduction, or

   (B) That there was a rescission, partly in writing and partly oral, of the original contract by the letter of October 23 (Ex. 3), together with the conversations of the parties regarding price reduction, or

(C) That there was an oral modification or rescission of the contract by the conversations of the parties, or

(D) That there was a written modification or rescission of the original contract by the letter of October 23 (Ex. 3).

Under all these possibilities, can a court say, as a matter of law, the plaintiff is entitled to a directed verdict, because the defendant's defense of modification or rescission flies in the face of the Statute of Frauds, or should the court instruct the jury to find the fact answers as to whether there was a modification or rescission, partly oral and partly written, or all oral, or all written, and instruct as to what their findings should be in each instance, when applying the Statute of Frauds to the determined facts?

Cummings v. Arnold, 44 Mass. 486 at p. 489:

> "The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. *But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.*"

Maddaloni Olive Oil Co. v. Aquino, 191 N.Y. App. Div. 51, at p. 53:

"the change in the contract was as to the date of delivery. The Court below held that that amounted to a rescission of the original contract and substituted a new one therefor. *The House of Lords upon appeal held that it could not be held as a matter of law, that that amounted to a rescission to the original contract but that it was, at least, a question of fact for the jury as to whether the intention of the parties was to rescind the original contract.*"

POINT II

REPLY TO APPELLEE'S ANSWER TO SECOND ASSIGNMENT OF ERROR

(A) As previously set forth in detail in appellant's brief, there was substantial evidence of a decrease in price from $9.00 a bag to $8.00 a bag, and it is agreed that the appellant buyer ordered all the corn at $8.00 a bag. But the appellee-seller ignored the order. The appellee-seller could have shipped at $8.00, and still had a right to claim the $1.00 over that amount by notifying the buyer he was so doing.

See the following cases cited in appellant's brief:

46 Am Jur, Sales, Section 791 at p. 919.
Arkansas & T Grain Co. v. Young, 96 S.W. 142 (Ark.).
C. T. Gray & Sons v. Satuloff Bros., 105 So. 666 (Ala.).

The cases cited by the appellee, Krebs Hop Co. v. Livesley, 59 Or. 586, is not the factual situation in the case at bar. In the Krebs case, there was no evidence of any reduction in price. In that case the buyer merely offered to pay some price in between the contract price

and the lower market price. He had no basis for doing so.

Can it be said, therefore, that the appellee's damage, if any, is any more than $1.00 per bag, when the Sales Act states that "the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of the contract." Oregon Revised Statutes 75.640 (2)?

(B) Is the appellant-buyer to be held liable in damages for the October, November and December cars of corn which the appellee-seller was willing to sell for $8.00 a bag, and the appellant-buyer willing to buy at $8.00 a bag? (Please see again appellee's testimony as to this, supra, R. 56.)

POINT III

REPLY TO APPELLEE'S ANSWER TO THIRD ASSIGNMENT OF ERROR

1. There was, at least, a written, not oral, modification of the contract by the "abeyance" letter of October 23rd, but the Court held, by virtue of its direction of verdict and instruction as to time of breach, that the "abeyance" letter mean nothing, in practical effect. If the abeyance letter was of no effect, then the damages should be based upon the original contract shipping dates, as set forth in appellant's brief.

2. In any event, the damages can not be based upon February as the date of breach. In January, the appellant-buyer told the appellee-seller that he would pay no

more than $8.00, and the appellant-seller said he wanted $9.00. The seller can not prolong the date of breach to his market advantage.

Both of the cases cited by appellee, Teuscher v. Utah-Idaho Flour & Grain Co., 221 P. 1096, and James River Lumber Co. v. Smith Bros., 116 S.E. 241, on this point are authority, for damages being assessed as of January, or even an earlier date.

The appellee concedes in his brief that the appellant "finally repudiated any intention to perform the contract in January" (Appellant's brief, p. 18).

POINT IV

REPLY TO APPELLEE'S ANSWER TO FOURTH ASSIGNMENT OF ERROR

No further comment appears necessary regarding this point, except that the testimony was prejudicial (R. 60) and was not the same testimony as given previously (R. 40) as appellee contends, and if, by any chance, there was any relationship between the testimony given by the appellee in those two instances, the second statement (R. 60) was then "rubbing it in," so to speak, completely irrelevant and extremely prejudicial.

POINT V

REPLY TO APPELLEE'S ANSWER TO FIFTH ASSIGNMENT OF ERROR

Appellee's brief seems to concede that appellant's motion to dismiss should have been allowed if the appellee-seller's remedies provided in the contract were exclusive but argues that the seller had other remedies than those set forth in the contract.

The parties chose to set forth in the contract the rights of the seller in event of default by the buyer. Then they continued by saying that the contract covered the entire agreement of the parties. The seller now tries to disregard this latter provision, and seeks to interpret the contract so that he will not only have the three options, but others. The two sections must be read together, and can only be interpreted to mean that the parties agreed that the seller, upon default of the buyer, could do one of three things, and nothing else.

Appellant is not raising this point for the first time on appeal, as claimed in the brief of the appellee, hence the cases on this question are not in point. The fact that three cars were involved showed that seller considered that he should proceed under one of the options that the parties agreed seller should have. The reference to American Jurisprudence in appellant's brief was only to show that what the seller did as to part would apply to the whole. It is not a question of election of remedies, but rather, whether appellee has any right whatever to pursue the remedy which he now does.

Appellee says on page 20 of his brief that "the appellant could, perhaps, argue an exclusive remedy by implication" under the Permutit Co. case. The fact that certain remedies were set forth in the contract, even though not specifically made exclusive, is alone sufficient reason for allowing the motion to dismiss, under the holding of the Permutit Co. case. But the parties here went even further, by providing that the contract expressed the entire agreement. Therefore, either by implication or express agreement, seller was limited to the remedies provided in the contract.

The Oregon cases cited by appellee certainly do nothing more than fortify the position of appellant.

Had the seller desired other remedies in event of buyer's default, he could easily have provided them. But he printed his form so as to have certain specified rights, then provided that his contract contained the entire agreement. He now asks this Court to add what he chose to omit.

The fact that seller chose to so act as not to be in a position to avail himself of his rights under the contract (Appellees' brief, p. 20) is not the responsibility of the buyer, nor of this Court, and the motion to dismiss should have been allowed.

CONCLUSION

For the reasons stated in appellant's brief, and as reiterated herein, it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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